Filed 10/22/15 In re Ryder S. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re RYDER S., A Person Coming Under the Juvenile Court Law.	B261171 (Los Angeles County Super. Ct. No. DK06035)
COUNTY OF LOS ANGELES DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Petitioner, Respondent, and Cross-Appellant, v. BRANDON S., Defendant, Appellant, and Cross-Respondent.	

APPEALS from orders of the Superior Court of Los Angeles County, Terry T. Truong, Temporary Judge.* Reversed; cross-appeal dismissed as moot.

Jennifer L. King, under appointment by the Court of Appeal, for Defendant, Appellant, and Cross-Respondent.

Mark J. Saladino, County Counsel, Dawyn R. Harrison, Assistant County Counsel, and William D. Thetford, Deputy County Counsel, for Petitioner, Respondent, and Cross-Appellant.

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* (Pursuant to Cal. Const., art. VI, § 21.)

INTRODUCTION

Brandon S. (father) appeals from the juvenile court's order sustaining jurisdiction over his four children: Ryder S., then three years old, and triplets P.S., Maverick S., and Wyatt S., then six months old (collectively, the children). Father contends insufficient evidence supports the court's findings under Welfare and Institutions Code section 300, subdivision (b)(1)[1] that his history of domestic violence, the last incident of which occurred in 2010, and use of medical marijuana placed his children at a substantial risk of physical harm. Father also challenges the court's dispositional order bypassing family reunification services under section 361.5, subdivision (b)(13) based on his marijuana use. The Department of Children and Family Services (Department) cross-appeals from the court's order bypassing father's reunification services. The Department argues the court erred in not finding father's services should be bypassed under section 361.5, subdivisions (b)(10) and (b)(11). Because insufficient evidence supports the court's jurisdictional findings, we reverse the jurisdictional order, vacate the dispositional order, and dismiss the Department's cross-appeal.

FACTUAL AND PROCEDURAL SUMMARY

Around May 2014, the Department received a referral alleging that father and the children's mother, Lindsay D. (mother), fought constantly, that Ryder had been locked in his bedroom, that the family's house was filthy and unsanitary, and that father smoked marijuana outside the house. After receiving the referral, the Department responded to the family's home in Norwalk to check on the children.

Initially, father was cooperative but skeptical of the Department's need to investigate the children. During the Department's second visit, father allowed one of the Department's social workers to tour the home. The home was clean and well-supplied with food and clothing. The children appeared healthy and showed no signs of physical abuse or neglect.

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[1] All undesignated statutory references are to the Welfare and Institutions Code.

Father told the social worker he has a prescription for medical marijuana to treat his insomnia and he regularly smokes marijuana late at night and early in the morning to help him sleep. He said he smokes discreetly and never around his children.

In July 2014, a social worker made an unannounced visit to the family's house. The social worker first contacted mother, who refused to talk about the children. Father then approached the social worker and began yelling at her. He told the social worker that he would not let the Department search the house again without a warrant.

The Department later obtained an investigative search warrant, which it executed on September 4, 2014. On that date, the family's house was untidy and dirty, with trash and clothes strewn throughout most of the rooms. The bathrooms smelled of urine and the kitchen was full of unwashed dishes. The day after the search, father informed the Department that he planned to move out of the family's house because he believed he was responsible for the Department's investigation.

On September 11, 2014, the juvenile court issued a removal order for the children. When the Department attempted to serve the order on the family, mother and the children were not home, and father denied knowing where they were. Several days later, the Department received a call from mother's cousin, who said that the triplets were staying with her and her husband and that Ryder was staying with his maternal grandparents in Seal Beach. The triplets were later moved to the grandparents' home in Seal Beach after the Department discovered the cousin's husband had a criminal history.

On September 17, 2014, the Department filed a petition alleging father's use of marijuana and the dirty and unsanitary condition of the family's home placed the children at risk of harm under section 300, subdivision (b). The court found a prima facie case showing the children fell within the meaning of section 300, subdivision (b) and ordered the children released to their parents' custody on the condition that father drug test and demonstrate a decrease in his use of marijuana.

On September 23, 2014, father submitted a urine sample for a drug test. The sample tested positive for cannabinoids[2] at a concentration of 2129 ng/ml. On October 2, 2014, father submitted a second urine sample, which tested positive for cannabinoids at a concentration of 573 ng/ml.

On October 16, 2014, the Department reported that father had been involved in a dependency proceeding initiated in July 2009 on behalf of his oldest son, who has a different mother than the children in this case. The court in that case sustained allegations that father had physically abused the son's mother, that he had a criminal history for spousal and child abuse, and that he regularly and excessively used marijuana. The court ordered the Department to provide father family reunification services, which required him to enroll in parenting and drug counseling and submit to random drug testing. The court terminated father's reunification services in August 2010, and it terminated his parental rights to his son in February 2011. The record does not indicate why prior the court terminated father's reunification services or parental rights.

The Department also reported father's criminal history, which included several misdemeanor convictions occurring between June 2007 and June 2010. In June 2007, father was convicted of misdemeanor battery against his ex-girlfriend (Pen. Code, § 243, subd. (e)(1)) and misdemeanor willful cruelty to a child (Pen. Code, § 273a, subd. (b)). Father physically assaulted his ex-girlfriend during an argument in front of her then four-year-old son. When the child tried to stop the argument, father picked him up and threw him across the room onto a bed, causing him to suffer a bloody nose. In June 2010, father was convicted of misdemeanor willful infliction of corporal injury on a cohabitant (Pen. Code, § 273.5) and misdemeanor exhibiting a deadly weapon (Pen. Code, § 417, subd. (a)(1)) after he physically assaulted the children's mother

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[2] "Cannabinoids are compounds containing tetrahydrocannabinol (THC). THC is the psychoactive ingredient in marijuana." (*In re Johnny O.* (2003) 107 Cal.App.4th 888, 890.)

while she was eight weeks pregnant with Ryder. Father was drunk and threatened to kill himself with a knife. When mother tried to stop him, father grabbed her arms, slammed her against the wall, and held the knife to her. Father bruised mother's wrists and chest during the assault. After discovering father's criminal history, the Department obtained a removal order from the court and the children were placed with their maternal grandparents.

On November 14, 2014, the Department filed a first amended petition, adding four allegations addressing father's history of violent behavior: one under section 300, subdivision (a), based on father's history of domestic violence (count a-1); two under section 300, subdivision (b), based on father's history of domestic violence (count b-1) and his prior convictions for violent crimes (count b-2); and one under section 300, subdivision (j), also based on father's history of domestic violence (count j-1). The first amended petition retained the allegations that father's use of marijuana (count b-3) and the dirty condition of the family's home (count b-4) placed the children at risk of harm. The court dismissed the original petition.

On November 21, 2014, the Department filed a second amended petition, supplementing counts a-1 and j-1 to include mother's failure to keep father away from the children as a grounds for establishing jurisdiction. The court dismissed the first amended petition.

In December 2014, the Department reported that it interviewed mother's 17 year-old son, Tyler,[3] who had been living with his maternal grandparents for the last couple of years. Tyler stated he liked mother and father, but he chose to live with his maternal grandparents because he did not want to leave his friends in Seal Beach when mother and father moved to Norwalk. Tyler never saw mother and father fight when he lived with them, and he was unaware of law enforcement ever responding to their home because of domestic violence. He felt safe when he was around father, and he never

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[3] Brandon S. is not Tyler's father.

saw father use drugs or consume alcohol. He believed father was a good parent to Ryder.

The Department also interviewed mother. She denied ever being abused by father, and she could not recall law enforcement responding to their house for domestic violence. Mother claimed she had been unaware of father's prior incident of domestic violence with his ex-girlfriend, stating she only found out about the incident after the Department's investigation.

Mother also discussed father's marijuana use. She stated father uses marijuana only at night to help him sleep, and he never smokes it in the house or around the children. While he lived with the family, father stored the marijuana in the garage, where the children were not allowed to go and none of the children's toys or belongings were kept.

Mother denied that she or father ever use physical force to discipline the children. When Ryder misbehaves, they place him in "timeout" for several minutes in a place where they can watch him, and they never make him go to his room alone for timeout. According to mother, father moved to a homeless shelter after the Department began investigating the family. He was unemployed and living off of a family trust. Mother stated that while he lived with the family, father did not regularly contribute money for rent or childcare.

The Department also interviewed the children's maternal grandfather. He first met father about five years ago, but he did not know him very well. While he was aware of father's "checkered past," he believed father had placed that past behind him and was a good parent to the children. He had no concerns about father's ability to continue to raise the children.

On December 8, 2014, the court held a jurisdiction hearing. Father did not attend the hearing, but his counsel did. The Department agreed to strike counts a-1, b-4, and j-1.

Father's counsel argued the court should dismiss counts b-1 and b-2 because father's last incident of violence was too remote in time to create a risk of harm to the

children's safety. In addition, counsel submitted a certificate showing father completed a 52-week domestic violence program after the 2010 incident involving mother, and argued that father's completion of the program demonstrated he had taken considerable steps to address his prior issues with violence. She highlighted the fact that neither the children's maternal grandfather nor mother's 17 year-old son believed that father was a danger to his children.

Father's counsel also argued the court should dismiss the allegation that his marijuana use placed the children at a risk of harm. She argued there was no evidence that father's marijuana use rose to the level of abuse or endangered his children.

At the conclusion of the jurisdictional hearing, the court sustained counts b-1 and b-3 and dismissed count b-2. The Department then requested the court bypass family reunification services for father under section 361.5, subdivisions (b)(10), (b)(11), and (b)(13). The court found by clear and convincing evidence that father should not be provided reunification services under section 361.5, subdivision (b)(13). The court removed the children from their parents' custody and ordered them to remain placed in their maternal grandparents' home. The court ordered father to have monitored visits with the children.

On May 19, 2015, the juvenile court granted in part a section 388 petition, returning the children to mother's custody. On June 30, 2015, the juvenile court ordered the dependency proceedings transferred to Orange County, where mother lives.[4]

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[4] On our own motion, we take judicial notice of the juvenile court's minute orders dated March 9, March 19, May 12, May 19, June 30, July 14, and August 26, 2015. Although the dependency proceedings are now pending in Orange County, our decision is binding on that juvenile court. (*In re Lisa E.* (1986) 188 Cal.App.3d 399, 403-405.)

DISCUSSION

The Juvenile Court's Jurisdictional Findings

1. *Applicable Law and Standard of Review*

Section 300, subdivision (b)(1) provides for jurisdiction when a "child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, . . . or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse." To support a jurisdictional finding, the Department must prove its allegation by a preponderance of the evidence. (§ 355.)

We review a juvenile court's jurisdictional findings for substantial evidence. (*In re Drake M.* (2012) 211 Cal.App.4th 754, 763 (*Drake M.*).) We will affirm the finding if it is supported by evidence that is reasonable, credible, and of solid value. (*Ibid*.) Inferences drawn from speculation or conjecture do not constitute substantial evidence and cannot support a jurisdictional finding. (*Ibid*.) " 'The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.' [Citations.]" (*Ibid*.)

2. *Substantial Evidence Does Not Support the Count b-3 Jurisdictional Finding*

Count b-3 alleges father "has a history of illicit drug use and is a current user of marijuana, which renders [him] incapable of providing regular care for the children." It goes on to allege that, on prior occasions, "father was under the influence of illicit drugs while . . . the children were in [his] care and supervision," endangering the children and placing them at a risk of harm.

To establish jurisdiction based on a parent's use of a controlled substance, the Department must prove that the parent's use harmed the child, or placed the child at a substantial risk of harm, or that the parent abuses the substance, and because of that abuse, is incapable of providing regular care for the child. (*Drake M.*, *supra*, 211 Cal.App.4th at pp. 763-764.) Cases where jurisdiction is based on the parent's

substance abuse tend to fall into two categories. (*Id*. at pp. 766-767.) In the first category, there is evidence that the substance abuse causes or contributes to an identified, specific hazard in the child's life, such as a pattern of physical abuse or neglect. (*Id*. at p. 767.) In the second category, the children are of such tender years that the parent's substance abuse is prima facie evidence of the parent's inability to provide regular care, resulting in a substantial risk of physical harm to the child. (*Id*. at p. 767.)

Here, the Department alleges father's use of marijuana both placed the children at a risk of harm and rose to the level of substance abuse, rendering him incapable of providing regular care for the children. The evidence does not support a jurisdictional finding based on either ground.

First, there is no evidence father's use of marijuana ever harmed the children or placed them at a risk of harm. Father smokes medical marijuana on a regular basis to treat his insomnia. He smokes it only at night and in the early morning to help him sleep, and he never smokes it around the children. While he was living with the children, he stored it in the garage, where the children were not allowed to go and where none of the children's toys or belongings were kept. The Department presented no evidence that father was high while caring for the children, that he drove the children while he was high, or that he otherwise engaged in dangerous activities around the children while he was high. A jurisdictional finding cannot be sustained on father's use of medical marijuana alone. (See *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003 [the Department must present evidence of a specific, non-speculative and substantial risk to the children of serious physical harm stemming from the parent's use of a controlled substance]; *In re Alexis E.* (2009) 171 Cal.App.4th 438, 453 (*Alexis E.*) [a parent's "use of medical marijuana, *without more*, cannot support a jurisdiction finding that such use brings the minors within the jurisdiction of the dependency court"].)

Second, there is no evidence that father abused marijuana, which would establish a prima facie case that he was incapable of caring for his children who were of "tender

years" at the time of the jurisdiction hearing. (See *Drake M., supra,* 211 Cal.App.4th at p. 767; *In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.) In *Drake M.,* we set forth two grounds upon which a juvenile court's substance abuse finding may be based: (1) evidence showing that the parent has been diagnosed as having a current substance abuse problem by a medical professional; or (2) evidence establishing that the parent has a current substance abuse problem as defined in the fourth edition of the American Psychiatric Association's Diagnostic & Statistical Manual of Mental Disorders (DSM). (*Drake M., supra,* 211 Cal.App.4th at p. 766.) After we decided *Drake M.,* a fifth edition of the DSM was published, replacing the fourth edition's definition of the term "substance abuse" with a more broadly defined category of "substance use disorders." (See *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1218, fn. 6 (*Christopher R.*).) The fifth edition also revised some of the criteria for identifying a substance use disorder. (See *ibid*.) For example, the fifth edition eliminated a criterion based on the user's recurrent substance-related legal problems and added a criterion based on the user's craving or having a strong urge or desire to use the substance. (See American Psychiatric Association, Highlights of Changes from DSM-IV-TR to DSM-5 < http://www.dsm5.org/Documents/changes%20from%20dsm-iv-tr%20to%20dsm-5.pdf > [as of Aug. 17, 2015].) Still, the fifth edition's criteria for identifying a "substance use disorder" are largely identical to the fourth edition's criteria for identifying "substance abuse." (See *ibid*.) Under both editions, the criteria include: (1) recurrent use of the substance resulting in the user's failure to fulfill major obligations at work, school, or home; (2) recurrent use of the substance disrupting the user's familial or social life; and (3) recurrent use of the substance in physically hazardous situations, such as when driving a car. (*Drake M., supra,* 211 Cal.App.4th at p. 766; Diagnostic and Statistical Manual of Mental Disorders: DSM-5 (5th ed. 2013) Substance-Related Disorders, p. 509.) While cases decided after *Drake M.* have observed that a medical diagnosis and the DSM's guidelines are not the only means of establishing substance abuse, they have found these tests provide generally useful and workable definitions of

substance abuse for purposes of section 300, subdivision (b). (See *Christopher R.*, *supra*, 225 Cal.App.4th at p. 1218.)

Father's use of marijuana does not rise to the level of substance abuse. While father does not deny he uses marijuana on a regular basis, he was prescribed the drug as a treatment for his insomnia, and there is no indication he uses the drug for purposes other than treating his insomnia. Nevertheless, even assuming that, as the Department argues, father's use of marijuana in the early morning proves he uses the drug for purposes other than helping him sleep, that does not mean father has a substance abuse problem.

Here, there is no evidence whatsoever that father's use of marijuana has disrupted his relationship with his children or mother. For example, nothing in the record indicates he acted differently around the children because of his marijuana use. (See *Alexis E.*, *supra*, 171 Cal.App.4th at p. 453 [the father's marijuana use changed his demeanor, causing him to become irritable, lose his patience with his children, and often refuse to help his children with common parenting tasks such as preparing food].) Further, there is no evidence father has operated a vehicle or engaged in other dangerous activities while under the influence of marijuana. (See *Drake M.*, *supra*, 211 Cal.App.4th at p. 767.) Although the family's home was dirty and untidy at times while father was living there, there is no indication that the children were malnourished, injured, or otherwise neglected while in father's care. Indeed, the Department's September 17, 2014 report noted that while the children were in father's care, the house was well-supplied with diapers, baby formula, and other baby products and the children did not show signs of abuse or neglect. While father appears to have had difficulty maintaining a job and contributing to the family's rent, the Department presented no evidence that these issues were in any way caused by, or linked to, father's marijuana use. Finally, father submitted to random drug tests, in compliance with the court's detention order, and demonstrated a decline in his marijuana use more than two months before the court made its jurisdictional findings.

We acknowledge that the results of father's first drug test, which was taken on September 25, 2014, show that father had a high concentration of cannabinoids in his system. However, the Department presented no evidence that the children were in father's care at the time of the test. In fact, the Department acknowledged in a last minute information report that, as of September 15, 2014, or more than a week before the first test was taken, the children were no longer living with father. In addition, there is nothing in the record to demonstrate that the high concentration of cannabinoids in father's system was inconsistent with his admitted use of marijuana pursuant to his medical prescription for the drug.[5] There is also no evidence that father suffered any side-effects from using the drug pursuant to his prescription that impacted his ability to care for his children during the periods of the day he claimed he was not smoking marijuana.[6] In any event, as of October 2, 2014, or only ten days after father's first drug test, the concentration of cannabinoids in father's system dropped dramatically,

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[5] In recognizing that the Department failed to produce evidence showing father used marijuana in excess of his prescription, we note that the Compassionate Use Act expressly states that one of its purposes is "[t]o ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to . . . sanction." (Health & Saf. Code, § 11362.5, subdivision (b)(1)(B).)

[6] Indeed, the Department introduced no evidence addressing the significance of the concentration of cannabinoids in father's system. Specifically, the Department did not introduce evidence demonstrating how the levels reflected in father's tests would have affected his behavior or ability to care for his children, especially during periods of the day when father claimed he was not smoking marijuana.

Although the Department cites in its respondent's brief to two studies addressing the behavioral and physiological effects of marijuana, the Department did not introduce those studies during the jurisdictional hearing. The Department also failed to file a motion requesting this Court to take judicial notice of the studies, explaining the relevance of the studies to this appeal, setting forth the reasons the studies should be admitted before this Court in the first instance, and including copies of the studies. (See Cal. Rules of Court, rule 8.252.) We decline to take judicial notice of the studies on our own motion.

indicating that he was taking steps to address the Department's and the court's concerns about his marijuana use.

The Department argues the disposition of the dependency case involving father's oldest son, which was initiated more than five years before the original petition in this case was filed, demonstrates father has a substance abuse problem. The Department assumes father's parental rights in that case were terminated because father failed to address his marijuana use. Relying on that assumption, the Department asserts father's failure to address his use after his parental rights were terminated demonstrates he has a substance abuse problem.

This argument is flawed because it is based on an assumption that is not supported by the record. The Department summarized the prior dependency proceedings involving father's oldest son in its reports submitted to the juvenile court below. Those summaries indicate only that the Department filed a petition on behalf of father's oldest son; that father was provided reunification services and a court-ordered case plan, which included, among other things, drug counseling; that father's reunification services were terminated; and that father's parental rights were terminated. There is nothing in the record that describes why father's reunification services and parental rights were terminated. Indeed, in addressing a separate argument in its brief on appeal, the Department acknowledges the record is silent as to what extent, if any, father's drug use played a role in the juvenile court's decision to terminate his parental rights to his oldest son.

Finally, the facts of this case are distinguishable from those underlying *Christopher R.*, a case the Department contends compels us to uphold the juvenile court's jurisdictional finding. There, the father used marijuana illegally on a daily basis for several years. (*Christopher R.*, *supra*, 225 Cal.App.4th at p. 1219.) He continued to do so even though his two-week old child was born with a positive toxicology screen for cocaine and other illicit drugs and his child's mother had shown signs of abusing cocaine around the time of the child's birth. (*Id.* at pp. 1218-1220.) In addition, the

father violated his parole because he missed several drug tests, and, when he did submit to tests, he tested positive for marijuana, also in violation of his parole. (*Id*. at p. 1219.)

Because there is insufficient evidence that father's marijuana use rose to the level of substance abuse or placed his children at a substantial risk of serious harm, the court erred in upholding the Department's count b-3 allegation.

3. *Substantial Evidence Does Not Support the Count b-1 Jurisdictional Finding*

In its respondent's brief, the Department does not address the court's finding sustaining count b-1, which was based on father's history of domestic violence. At oral argument, the Department conceded that the finding is not supported by substantial evidence because the prior incidents of violence are too remote in time and father has since completed a domestic violence prevention program. Nevertheless, we recognize the seriousness of a domestic violence allegation in a dependency case and analyze the merits of father's challenge to the court's finding sustaining count b-1. That finding is also not supported by substantial evidence.

Count b-1 alleges father "has a history of engaging in violent altercations with his significant others including [mother]." The count further alleges "[t]here was a physical altercation between [mother] and [father] in 2010 when [mother] was eight weeks pregnant. [Father] with a knife in his hand, grabbed [mother], pushed her against the wall and tried to hit her . . . . Nevertheless, [mother] allowed [father] to eventually return to the household." The count alleges father's history of violence, and mother's failure to keep father away from the children, places the children at risk of harm.

To support a jurisdictional finding under section 300, subdivision (b) based on physical violence between a child's parents, there must be evidence "that the violence is ongoing or likely to continue and that it directly harmed the child physically or placed the child at risk of physical harm." (*In re Daisy H.* (2011) 192 Cal.App.4th 713, 717 (*Daisy H.*).) A past isolated incident of conduct that endangered the child does not support a jurisdictional finding if there is no indication similar conduct is likely to recur. (See *ibid;* see also *In re Alysha S.* (1996) 51 Cal.App.4th 393, 398-399 (*Alysha S.*);

c.f. *Christopher R., supra,* 225 Cal.App.4th at p. 1216 [a parent's past conduct may be probative of current conditions if there is reason to believe the conduct will continue].)

There is insufficient evidence to demonstrate father's history of domestic violence places the children at a current substantial risk of physical harm. Although father engaged in a significant amount of domestic violence in the mid to late 2000s, there is no indication that he has acted out violently since his last altercation with mother in June 2010, more than four years before the Department filed the original petition. (See *Daisy H., supra,* 192 Cal.App.4th at p. 717 [the last incident of violence that occurred between two and seven years before the Department filed its petition was too remote in time to support a jurisdictional finding that domestic violence between the child's parents placed the child at a current substantial risk of physical harm].) Since that incident, father completed a 52-week domestic violence program and there have been no reports that he has been physically violent with mother or the children. When the children were examined after the Department received the referral, they appeared healthy and well-cared for and showed no signs of having been physically abused. Mother's 17-year old son told the Department that he had never seen father act violently toward mother or the children, and the children's maternal grandfather reported that he had no concerns about father's ability to raise the children. Accordingly, the court erred in upholding the Department's count b-1 allegation.

DISPOSITION

Because neither count upon which the juvenile court's jurisdictional order is based is supported by substantial evidence, we reverse that order.[7] Since there is no

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[7] We recognize that where the court makes jurisdictional findings as to both parents, and only one of the parents against whom the court's jurisdictional findings were made appeals those findings, the juvenile court maintains jurisdiction over the minors based on the findings made against the non-appealing parent. (See *Alysha S., supra*, 51 Cal.App.4th at p. 397 [a "minor is a dependent if the actions of either parent bring her within one of the statutory definitions of a dependent"].) In this case, however, the factual basis for the portion of count b-1 sustained against mother is

other basis for maintaining jurisdiction over the children, we also vacate the dispositional order bypassing family reunification services.[8] (*In re James R.* (2009) 176 Cal.App.4th 129, 137; *In re David M.* (2005) 134 Cal.App.4th 822, 833.) The Department's cross-appeal is dismissed as moot. The Los Angeles Superior Court is directed to forward a copy of this opinion to the Orange County Superior Court where the children's dependency proceedings were transferred.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J. ALDRICH, J.

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entirely dependent on the factual basis for the portion sustained against father. Since we conclude insufficient evidence supports a finding that father's history of domestic violence placed the children at a current substantial risk of physical harm, it necessarily follows that insufficient evidence supports the finding that mother's failure to keep father away from the children because of his history of domestic violence placed the children at a risk of harm.

[8] As a result of our holding, we do not address the parties' arguments concerning the juvenile court's dispositional order denying father family reunification services.